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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 267

ALBERT G. GLASS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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Statement

Petitioner seeks a review of a judgment of the Court of Appeals of the State of New York rendered April 28, 1960, unanimously affirming the conviction of petitioner for the Crimes of Bribery and Conspiracy.

Questions Presented

1. Did the Trial Court abuse its discretion in denying motions for a mistrial and severance, made by petitioner during the trial upon the ground he was then unable to testify in his own defense because of his physical condi-

tion, and thereby, did the Trial Court violate petitioner's rights under the XIVth Amendment of the Constitution of the United States?

2. Is the contention urged in petitioner's second question properly preserved for review in this Court?

Statement of Case

The indictment against petitioner arose out of an investigation conducted by a Grand Jury of Suffolk County, State of New York, concerning corruption in said County government. As a result of that investigation, petitioner was indicted for the Crimes of Conspiracy and Bribery. He was found guilty of these crimes by a trial jury and his conviction was unanimously upheld by an intermediate appellate court and by the Court of Appeals of New York State.

The first question raised by petitioner herein, does not bear upon the merits or the issues involved in his conviction. It bears solely upon the exercise of discretion on the part of the trial court in denying petitioner's various motions for a severance and a mistrial due to his alleged physical condition.

The record discloses that the petitioner Glass, from the latter part of 1955, to his sentence in 1958, raised his physical ailment as an attempt to avoid that stage of the investigation or trial in which he found himself.

It was not until the People's case in said trial, was coming to a close that petitioner, for the first time, raised his alleged ailment as a bar to testifying in his own defense. Prior to that time his position was that he could not stand trial, and prior thereto, that he was unable to appear before the Commissioner of Investigation of the State of New York (R. 250, 251-252).* Petitioner offered in evidence

* References are to pages of the printed Record.

at his trial, certain medical reports from doctors who described his heart condition. These reports were submitted to the Court initially, in connection with an application to punish petitioner for contempt, for disobedience of a subpoena issued by the Commissioner of Investigation of the State of New York in 1956 (R. 97; Def's. Exhs. A through D, R. 2184-2201, 248-251).

Doctor Master's letter, dated June 14, 1956 (Def's. Exh. D, R. 2200, 251), states in part:

> ". . . I feel that if the patient does not become exasperated and is not questioned to the point where he becomes tired or excited, that he could be questioned. While talking to the patient in my office, he became emotional and wept. He was sure he could not stand being 'badgered'. As a matter of fact, Mr. Glass is very nervous and this may prove more of a difficulty than the physical status of the patient. However, as I say, if he is examined, and the interrogations are curtailed if the patient reacts poorly to them, I think he could testify".

In November 1957, a motion was made by the petitioner for a severance (R. 92-103, 251). The above mentioned exhibits (Def's. Exhs. A-D) were given to the Court at that time (R. 97, 98) and, in addition, a further medical report dated October 1957, from a Doctor Maynard (Def's. Exh. E, R. 104-107, 252). Said report stated (R. 106):

> "Because of the fact that Mr. Glass is acutely ill he is not in satisfactory condition to stand trial at present. It will probably take at least two weeks before he recovers from the present acute illness. If he returns to the state of health in which he was before the recent acute illness it is my opinion that he cannot stand trial without undue risk unless the court can make arrangements so that Mr. Glass can have rest periods if required during the proceedings and have

an opportunity to take medication for chest pain when and if it occurs."

The motion for a severance at that time, was denied (R. 251).

On the third day of petitioner's trial, while the jury was being selected (April 24, 1958), Glass made a similar motion for a severance based on his past medical history and exhibits (R. 247-253). Another letter from a Doctor Wolins to Judge Markewich (the trial judge), (Def's. Exh. F, R. 2202-2204, 253) was also submitted to the Court on this motion (R. 268). This motion was denied. Doctor Wolins' letter stated in part (R. 2203):

"Under such circumstances, it would seem only right (inasmuch as Mr. Glass both by his own statement and by his behavior does not seem to wish to avoid appearing in court), that in fairness to Mr. Glass due consideration be given to his physical incapacity. I would suggest first that sessions be relatively short, and that he be given the privilege of interrupting the sessions at any time at which episodes of pain occur. At these times, in addition, he be permitted to show a preference for continuing the session if his pain subsides with medication, or discontinuing the session until several hours later or the following day. If this procedure is not followed, there is a distinct possibility that Mr. Glass' health, or even his life, may be endangered by the procedures of the courtroom".

The court stated that from personal observations of its own, prior to this motion for a severance (R. 262), Glass' conduct was inconsistent with his duty and responsibility to conserve his health (R. 262-266, 267-268, 270-273).

On May 13, 1958, as the People's case was coming to a close, petitioner renewed his application for a severance on the grounds that to testify on his own behalf would put

an undue strain on his heart and endanger his life (R. 1134-1136).

At this time and in support of this motion, an additional letter from Dr. Wolins and one from a Dr. Stein, both dated May 12, 1948, were admitted into evidence as Defendant's Exhibits F1 and F2 (R. 2204, 2205, 1136).

Dr. Wolins' letter stated (R. 2204):

> "In my opinion the physical condition of Mr. Albert Glass is such that testifying on a witness stand may endanger his life".

Dr. Stein's letter stated (R. 2205):

> "I believe that an extreme 'excitable' state is very dangerous for him and have advised him that under these circumstances it would endanger his life to testify".

The trial court stated at this time (R. 1142-1144):

> "Now, I don't know just where you draw the line in a situation like this. It is impossible even for members of the medical profession to draw the line between what is physical and what is emotional. Those things which we call psychosomatic are just as real, even though emotionally induced, as if they were the result of a physical trauma, and I suppose there is a question as to how far what we may call a self-induced state of illness can be availed of by one having to undergo an unpleasant experience in attempting to release himself from the necessity of undergoing that experience.
>
> My job is not made any easier by the fact that, as I mentioned at some length at various other proceedings similar to this one, I have had Mr. Glass practically thrust under my nose outside of the courtroom, without any fault of his or mine; as I indicated; there is a limited sphere in which we can both exist in this

community in these circumstances. Last week, for instance—and this was not of my seeking, and I know definitely it was not of his seeking—but circumstances required that I occupy a room right next door to him at the hotel, and of course, in my comings and goings from the courthouse and from the hotel, I have run into him continually and I had had occasion to observe him and to some extent I have put the things which I have observed on the record, and I have observed other things.

Of course, I am no doctor. I can say that there are things which I have observed which just don't jibe with the sort of thing that I have heard here, and yet they do, in taking into consideration the fact that Mr. Glass apparently is the sort of person who doesn't observe precautions, and as I indicated on a previous occasion, I don't know where the limits lies between his responsibility and the Court's responsibility for his physical condition and the consequences of his acts. I have said before that if he doesn't look after himself outside the courtroom, I don't know how far my responsibility goes inside the courtroom.

Now, for instance, one thing that is very strange is this: I have never heard of a man afflicted with coronary disease who is permitted to smoke, and I have observed him smoking on all sorts of occasions. I have observed a change in his attitude, in his appearance, in his posture, at times when he should have had reason to believe he was not under observation, changing almost immediately as it became apparent that somebody was there who could see him, namely myself. I am not imagining these things: these are things that I have seen".

The court then arranged to have Glass examined by a physician selected by the New York County Medical Association (R. 1150-1151, 1153).

The court reserved decision on this renewed motion for severance (R. 1153) and recessed the case until May 19, 1958, in order to allow Glass, time to be examined by the physicians to be selected in the manner above described (R. 1274-1275).

As a result of the above examination of the petitioner, letters from two physicians who had examined him were received into evidence as Court's Exhibits 2 and 3 (R. 2213-2217, 2218-2220, 1277, 1278).

In addition, supplementary letters from these two physicians stated that a greater burden would be put on Glass' circulation if he took the stand than if he remained seated without testifying (Court's Exhibits 6 and 7, R. 2225-2227, 1278, 1279).

The court reserved decision on this motion for severance, stating that it was still under consideration, it being a matter for its discretion and conscience (R. 1279).

The Court, on May 20, 1958, denied Glass' application for a severance stating (R. 1421-1422):

> "On the basis of what is before me at this time, cumulatively up to this point inclusive of the reports which have been marked into evidence as defendant's exhibits and Court's exhibits, and inclusive of my own observations, I am not persuaded at this time that the interests of justice require a severance with respect to the defendant Glass. As far as I have been able to observe, there is no more reason for such a severance than existed last week or the week before. His conduct, such as I have been able to observe, has been the same as it was last week and the week before, without the necessity of my going into detail.
>
> There has been no doctor in attendance, and Mrs. Glass, in fact, was not in the courtroom this morning, which may possibly have been the result of the fact

that counsel admonished her for her conduct yesterday afternoon, which was called to everybody's attention during the course of a conference at the bench and which consisted of yawning rather loudly and in a disturbing manner.

Regardless of what may be anybody else's duty or concern to do with respect to the case, the responsibility for this decision is peculiarly mine, and it is a matter for my discretion and for my conscience, and that is the way I feel about the situation at this moment.

The motion is denied as of this time, with, of course, an appropriate exception to the defendant."

Almost all the reports from the doctors, submitted as exhibits in this case, stated that certain safeguards be used if Glass' case was to continue.

The Court at all times made these safeguards available to the petitioner Glass.

On May 21, 1958, Glass petitioned the Appellate Division, Second Department, in an Article 78 proceeding, for an order of prohibition to halt the trial. This application was heard on May 29, 1958. (Application of *Albert G. Glass* v. *Arthur Markewich*, 6 App. Div. 2d 793, 175 N.Y.S. 2nd 332.)

The Appellate Division denied Glass' application.

On May 22nd, in the absence of the jury, the court indicated that certain activities of Glass, appear to be inconsistent with his claim of being a very sick man and inconsistent with the duty and responsibility of care he owed himself (R. 1515-1522). The court realizing the great responsibility it had in this matter, because of the motions addressed to its discretion, inquired of the Bureau of Motor Vehicles as to an application made by Glass for a license (R. 1521-1523).

An application dated October 10, 1955, part of the Court's Exhibit 8 (R. 1523), indicated that Glass, at that time, stated on this application that he had a moderate heart ailment in December, 1954, but was fully recovered and attending to normal duties for many months (R. 1525). Dr. Duryee's report (Court's Exhibit 2) indicates that Glass told him that he had an attack in December 1954, and while in the hospital in February, 1955, he had a second attack and never returned to work since that time (R. 1525-1526).

In September, 1957, when Glass made a further application for a duplicate license, he stated on said application that he suffered no physical disability from which he has not completely recovered (R. 1526).

The Court remarked as to this inconsistency between the petitioner's application for a license and what he told his doctor (R. 1526-1527, 1529-1530, 1530-1532).

> "I don't know what the explanation is and I don't care. I know that at the very least this indicates a reckless disregard for himself. I have no intention of being made a fool of by Mr. Glass or anyone else. This should be indicative of what my disposition would be in the event that any further motion is made in this case for severance.
>
> I haven't any doubt, as I indicated, that this man is ill. I intend to pursue the schedule of time which has been pursued up to now, but in face of what I have seen here and in the face of what appears by this exhibit, I think that my duty is clear with respect to this, and I am not entirely certain whether or not what has happened here is not contemptuous of the Court, but in any event there is no point that I can see in pursuing any such proceeding. I don't know whether any counsel has anything to say in addition to what I

have just stated but if there is for the record, you may. (R. 1526-1527)*

* * * * *

". . . What I had to say was attributable to the man only, and I think that the Court has a right to be outraged when one makes the kind of inconsistent statements that he did and urges his condition upon the Court.

The damage that has been done is that while it may be true that his condition may have been whatever it was at some time in the past, and that what he did in 1955, in October of that year, and in September of 1957 in making his statements to the Motor Vehicle Bureau, there was a gross inconsistency between those statements and the ones that he made to Dr. Duryee. He either lied then, or he lied now to Dr. Duryee, one or the other; I don't know which.

As a matter of fact, he either lied in 1955 or in the 1957 statement to the Motor Vehicle Bureau; I don't know which, because the two are inconsistent." (R. 1529-1530.)

* * * * *

"The Court: I don't want to be found wrong either, but I say to you that a large portion of Dr. Duryee's opinion was based upon what the man told him as to what had happened to him, and apparently he has no

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*At the trial Glass' counsel disclosed complete agreement with the Court and affirmed their belief in the Court's sincerity and good conscience in making the rulings as to the motions for mistrial and severance (R. 1527):

"Mr. Smith: We, of course, did not know anything about what was just put upon the record. We have observed him in the office. He is a strange man, as you know, from your experience with him for these weeks and our experience with him for months. We did not realize the enormity of his physical problem, which to a certain extent is connected with an emotional problem, until the coming in of the reports to which you have made reference. We haven't the slightest doubt of your sincerity in making a ruling, nor that you have searched your conscience in making the ruling." (R. 1527)

compunction about telling the doctor that he never returned to work after February, 1955, because that serves his purpose there, whereas he has no compunction about telling the Motor Vehicle Bureau in 1955 and 1957 that he is perfectly all right and that he has returned to work, because that serves his purpose then in getting a license, and if the man chooses to drive a motor vehicle around, whether with one license plate or two, or six, I don't care about that either.

But I am concerned, as a member of the community, if, being as sick as he says he is, he has a license, and if he is as sick as he says he is, he is using it fraudulently, he drives that Cadillac around himself, and constitutes himself a danger to the community in reckless disregard of other people.

Now, I have said all that I am going to say about this subject, except for one thing. I have in mind that Dr. Denker very eloquently—this was the neuropsychiatrist—finished his letter with a quotation from Dr. John Hunter and as he puts it, when suffering from angina pectoris he put his situation very neatly by stating 'My life is at the mercy of any scoundrel who cares to excite me.'

I am not the scoundrel who cares to excite Mr. Glass. I am doing everything I can to avoid that. But if Mr. Glass chooses to excite Mr. Glass in his own way, I can't help it." (R. 1530-1532)

The appellant Glass at the time the defense rested, renewed his motion for a severence and mistrial on the same grounds urged on prior motions (R. 1786). This motion was again renewed in conjunction with a motion to set aside the verdict (R. 2073); and petitioner then raised for the first time, the federal question. These motions were denied (R. 1787, 2074).

At the time of Glass' sentence, two additional medical reports, Court's Exhibits 9 and 10 (R. 2228-2237, 2072-

2073), were received. These reports stated that Glass' health and life would be jeopardized if he were to be imprisoned.

The Court, before suspending the execution of the prison sentence given petitioner, upon certain conditions (R. 2126-2127), stated (R. 2122-2125):

> "I get down to this, that this man has been convicted of a serious crime. What he did was against the law, no question about that. What he did was reprehensible, no question about that. But I am faced with the proposition that this is a very sick man. Court's Exhibits 9 and 10 in evidence, placed into the record after the conviction, are the reports of Doctor Wright and Doctor Heller, and they indicate without doubt that to confine this defendant in prison might very well have extremely serious consequences. Now, although I am charged with the duty of pronouncing the ultimate judgment upon this defendant as far as this case is concerned, the law does not make me his executioner, and I have no intention of acting as such. I cannot fly in the face of these medical reports. I cannot send this man to prison and I will not send him to prison—let us understand that at the outset—because I am not going to be placed in the position of flouting the reports of competent medical men.
>
> However, by the same token, I cannot permit this man to continue the activities which he has carried on, for two reasons: In the first place, I am informed by the medical men, and as counsel know, because it was arranged between them that this be done, I had a conference of over an hour's duration a couple of weeks ago with one of the doctors who made the reports that I referred to and went very thoroughly into this matter, and I am convinced of several things: In the first place, the type of activity that has been carried on is dangerous to this man's health; he can't carry it on. In the second place, they advised me that cessation of

such activity will have the effect of prolonging his life. In other words, both sides of the coin are true—to carry on the activity would be dangerous to him, and to cease it would be beneficial to him.

Now, I know that viewed as a cold proposition, to send him to prison and to direct that he be confined in the hospital in the prison sounds as if this would be the best way to look after him. I know that is not so, because psychologically it is untrue. There is that about confinement itself which would be dangerous to this man. Yet at the same time, to have no rein or restriction upon him whatsoever would be to place him in a position where he could make a mockery of justice by walking around with a suspended sentence and carrying on business activities and everything else while others convicted who do not have the ill of good fortune to be sick are confined in prison for other parts of the same transaction.

Now, the question may be asked where one draws the line between his being sick and being able to carry on the activity which he is carrying on. There is a very simple explanation, and I say that the medical man agrees with me with respect to this. At one time during the trial I observed that this defendant was carrying on certain activities which seemed to be completely inconsistent with his physical condition, and one of his then counsel remarked that it was very difficult to hold him under any restraint, and one thing led to another in our conversation and on the record there is a statement by me in which I invited an application to commit him for observation, but of course no such application was made.

The answer is that this man is driven, apparently—and I say this as a layman, and even one who is versed in this profession would tell you that the science of psychiatry is inexact with respect to the border line between one thing and another—but he appears to be driven by a neurosis, which is not the same as a psychosis. In other words, while this man may be

emotionally twisted so that it is very difficult to refrain from activity, it doesn't reach the stage of mental illness that would justify a commitment on any kind on that score, and that is what is understood by this, and therefore this is something that the man can consciously control, must consciously control. Now, how?

I intend that Albert Glass shall not go to prison, because as I indicated, the medical reports say he should not. However, I must keep him from the activities I have spoken of, for the two reasons that they are dangerous to him and apparently he does need a caretaker, and also because, as I indicated, it would make a mockery of justice. I can do this by placing the key to the jail in his hands, and his hands alone."

Respondent does not set forth a concise statement of the case, material to petitioner's second question. It is respondent's position that said question was not timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari (Revised Rules of the Supreme Court of the United States: Rule 23(f)).

This position will be fully discussed under Point II, *infra*, of the argument.

ARGUMENT

POINT I

Petitioner's rights under the Fourteenth Amendment to the Constitution of the United States were not violated by the trial court's exercise of discretion in denying petitioner's motions for severance and mistrial which were based upon petitioner's alleged inability to testify in his own defense because of his physical condition.

Petitioner's claim under his first question is posited upon an alleged abuse of discretion on the part of the trial

court in denying motions made by petitioner for severance and mistrial. These denials, petitioner contends, compelled him to proceed with his trial under adverse personal physical conditions, in violation of his rights under Federal and State Constitutions (R. 2073).

Petitioner devotes a considerable portion of his brief to cases, statutes and miscellaneous reference which underline the basic principle that a defendant cannot be denied the right to testify in his own behalf.

There is no question in this record that the State of New York affords to every defendant the right to testify in his own behalf without limitation or qualification. The federal claim preserved by petitioner is not based on the ground that the State of New York denied the petitioner his statutory and constitutional right to testify in his own behalf, even though petitioner attempts to inject this contention into his petition.

Petitioner always possessed the right to testify in his own behalf. It was never taken away from him.

The federal question passed upon by the Court of Appeals of the State of New York and urged by petitioner, was that he was unable to testify because of his physical condition. No question was preserved by petitioner, nor passed upon by the Court of Appeals of the State of New York, that petitioner was denied the right to testify.

Petitioner's claim throughout his trial and on his appeals was based on one ground and one only. A claim of abuse of discretion on the part of the trial court in denying motions for mistrial and severance based on petitioner being unable to stand trial and later, being unable to testify on his own defense.

It is a rule of law that the granting or denial of a motion of one defendant to sever his case, rests within the sound judicial discretion of the trial court and such discretion

will not be disturbed on appeal in the absence of a showing of clear abuse.

Cvach v. United States, 212 Fed. 2d 520;
People v. *Tabet*, 402 Ill. 93, 83 N. E. 2d 829, certiorari denied 336 U. S. 970, 69 S. Ct. 933;
People v. *Oskroba*, 305 N. Y. 113, 111 N. E. 2d 235; reargument denied 305 N. Y. 696, 112 N. E. 2d 778;
Clark v. *Delaware & H. & R. Corporation*, 245 App. Div. 447, 283 N. Y. S. 739.

The exercise of discretion—the asking of a favor from the court below—is not to be performed arbitrarily or clearly abused. If it is, it is subject to review, as a matter of law.

"Abuse of Discretion" means action which is arbitrary, fanciful or clearly unreasonable. It implies that the trial court with total disregard to the circumstances and facts at the time and without applying judicial reason and sound logic to said circumstances and facts, decides a matter entrusted solely to its discretion, whimsically, or arbitrarily and without the use of judicial reason.

It was stated by the Court of Appeals of the State of New York in *Livermore, et al.* v. *Bainbridge, et al.*, 56 N. Y. 72, 76, as to judicial discretion:

> "It does not aid the appellants to show that the order was not justified by the facts upon which it was based, or that the discretion of the court below in the particular case was improvidently exercised. It is not sufficient to show that injustice has been done, *but it must appear that it was done under circumstances which authorize this court to interfere.* The affidavits brought to the attention of the court a circumstance upon which, the claim of misconduct was made. The judge at Special Term was called upon to decide in

respect to it. From the nature of the case, what is misconduct on the part of a jury or referee, and what facts establish it, are inquiries which cannot ordinarily be determined by the application of exact rules of law, and *the decision must be left mainly to the good sense and sound judgment of the judge before whom the inquiry is originally prosecuted. Different minds may reach different conclusions upon the same facts, and it is not to be supposed, that a judge under the guise of discretion will seek to do injustice.*" (Emphasis supplied)

The record will reveal that the trial court did not abuse its discretion; that petitioner's motions were denied only after careful consideration of all the circumstances and facts within the court's knowledge and conscience. The trial court's reasons for denying petitioner's motions were set forth under the statement of the case, *supra*, with appropriate references to the record where such reasons could be found.

The record does not reveal that petitioner's condition was so serious that it was necessary to confine him to a hospital or to his own bed. There is no indication in the record that petitioner was restricted to a minimum freedom of movement; that he was prohibited from walking, even up and down stairs; that he was prohibited from smoking; that he was prohibited from operating a motor vehicle; that he was prohibited and forbidden freedom to engage in any outside activities, business, social or otherwise.

In short, even though he had a "heart condition", he was not immobilized because of any stresses or strains, physical or emotional, pleasant or unpleasant, which could and might increase injury to his heart and health and ultimately his life. Petitioner had as much freedom of action as anyone else. In fact, he had more.

This is not a situation in which petitioner was confined by medical authority, to a bed, either hospital or home and was forced by legal compulsion to leave that bed and appear in court.

Almost all the reports from the doctors, submitted as exhibits in this case, stated that certain safeguards be used if petitioner's case was to continue.

The court at all times made these safeguards available to the petitioner. Petitioner did not consider his condition so serious as to avail himself of these safeguards.

The trial court's imposition of conditions upon its suspension of petitioner's prison sentence were not solely imposed, as petitioner claims, because the Court was in complete agreement as to the gravity of his illness. The conditions were imposed because the type of activities carried on by petitioner were inconsistent with his claim of being physically unable to proceed with his trial or to testify in his own behalf. Certain of these conditions required that petitioner cease his real estate speculation activities and his operation of a car and motor boat.

Petitioner has maintained throughout various stages of the trial and prior thereto, that because of his heart ailment and neurotic and emotional disposition, his life was in constant danger of being destroyed at any time.

However, after the Court imposed the limitations and conditions upon petitioner's sentencing, petitioner put up quite a struggle to keep from surrendering his driver's license to the Court (R. 2131-2136).

Petitioner's argument was that "he had just received a new license from the Motor Vehicle Commissioner after a complete checkup and examination by the Motor Vehicle Commissioner and the submission of doctors' reports" (R. 2133).

These medical reports, ostensibly by some of the doctors whose reports are defendant's and Court's exhibits in this case (R. 2135), stated that the petitioner had "a type of heart disease which does not cause sudden termination, such as the type of heart disease which keeps a man from driving an automobile. This is a type that is not that immediate" (R. 2133-2134).

Petitioner lifts a portion of a statement of the trial court from its context and states it indicates that said Court would not declare a mistrial unless the petitioner was found insane (Petitioner's brief, p. 7).

A reading of the prior omitted portion of the Court's statement reveals that the Court is commenting upon the stress placed upon a neurotic who is faced with the reality of making a decision as to whether he will testify or not (R. 1146). It does not indicate that the Court would only grant a mistrial if the petitioner was found insane.

Petitioner further claims that the Appellate Courts having rendered no opinions, their reasons for unanimously affirming the conviction of petitioner cannot be determined. Implicit in the decisions of the Appellate Courts was the fact there was no abuse of discretion, as a matter of fact and law, on the part of the trial court and therefore, no denial of petitioner's rights.

In order to premise a claim that the Appellate Division of the Supreme Court of the State of New York espoused the proposition that "if a sick defendant does not demonstrate that he will be well enough to testify at sometime in the future, he might as well be tried forthwith . . . half a trial being better than none" (Petitioner's brief, p. 25), petitioner quotes a sentence from a decision of said Court

on a collateral proceeding,* brought by petitioner, wherein that Court stated "No evidence was adduced that petitioner's condiion would improve in the future".

A reading of said Court's decision which is attached as Appendix D to petitioner's brief, indicates without doubt, that said Court was to decide petitioner's application, in that proceeding, on the basis of the papers submitted to the Court; that the sentence extracted from its context and quoted by petitioner, for a purpose alien to the decision, indicates only the Court's comments as to what information the petitioner's papers so submited contained or did not contain. It does not indicate directly or indirectly that Court's or any other State Court's adherence to the proposition ascribed to it by petitioner.

Having erroneously arrived at said premise that an intermediate appellate court in this State, which ultimately passed upon petitioner's appeal, subscribes to the principle that a defendant too sick to undergo trial and who does not indicate he would be better at a later time, must stand trial forthwith, petitioner proceeds to state that such a principle was rejected in *Eastland* v. *State*, 223 Miss. 195, 78 So. (2d) 127.

In the *Eastland* case, the defendant was convicted of embezzlement. On appeal his conviction was reversed and the case remanded.

The defendant in said case had the following physical and mental disabilities:

1. He suffered from general arteriosclerosis which affected his heart and his brain;

2. He suffered repeated heart attacks;

3. He had gall stones;

---

* Application of *Albert G. Glass* v. *Arthur Markewich*, 6 App. Div. (2d) 793, 175 N.Y.S. (2d) 332.

4. He had suffered from cerebral thrombosis and angina pectoris;

5. He had a marked enlargement of the heart;

6. He had experienced congestive heart failure, a phase of heart disease;

7. The arteriselerotic condition was as extensive in his brain as it was in the other parts of his body.

8. His brain would not be supplied with the normal amount of fresh circulating blood that would be required under pressure during the ordeal of a trial;

9. He had suffered two paralytic strokes;

10. He had two hernias for which his physician had refrained from operating because of his heart condition, in the absence of which an operation would have been performed.

This defendant was confined either to his own or a hospital bed for at least twelve months prior to the trial. The defendant not only was unable to intelligently confer with his attorneys or prepare his defense, but, in fact, his doctor stopped his counsel from having a conference with him because he was unable to physically and mentally participate in such a conference.

Defendant's counsel, on advice of defendant's physician, refused to produce the defendant, who was confined to his bed, for trial.

The trial judge, thereupon ordered the sheriff to go to the home of the defendant and bring him to court in an ambulance, if necessary. He was brought to court by his family, accompanied by his physician, under compulsion and protest. The trial lasted four days, during which time the defendant was physically and mentally incapable of conferring with his attorney.

The trial court had overruled repeated motions for a continuance, on the ground that the defendant would not be in any better condition to undergo trial at a latter time.

On appeal, the Supreme Court of Mississippi, stated:

> "If we should approve the test followed at the trial as to the right of the prosecution to proceed with a trial, when the accused is physically and mentally unable to stand trial within the meaning of section 26 of the State constitution, then any invalid could be brought from his bed at home or in a hospital and be tried for crime where the state is able to show that his condition would likely never improve." (78 So. (2d) 127, 131)

A mere reading of this case indicates its complete lack of relationship to the instant case.

The trial court's ground for denying Glass' motions for a severance was not founded on the fact that Glass would never improve. Glass did not have the serious physical and mental disabilities that reduced the defendant in the *Eastland* case to a mere "shell of a man". Glass was not confined to his bed at home or in a hospital; Glass conferred without any trouble with his attorneys in and out of court, in the defense of his case and; he appeared before the Grand Jury without claiming any physical or mental disability to do so. None of the physicians in this record claimed that Glass could not do these things or confined him to a hospital or to his own bed or even attempteed to curtail his activities. None of the physicians in the *Eastland* case, as in the present case, stated that the defendant could stand trial or testify if certain safety precautions were followed.

If petitioner was in the same situation as the defendant in the *Eastland* case, there is no question that the trial court on the facts and circumstances of the *Eastland* case, would have granted petitioner's motion for a severance.

The Court's comment in the *Eastland* case, that the defendant although present at the trial, "may as well have been absent" pertained to his mental disability brought about by his physical disability, which rendered him devoid of any mental faculties and capabilities to understand what was going on. Petitioner does not claim he was lacking "a capable operating mind". In fact, the physicians who examined him found nothing wrong, in any way, with his mental processes.

We contend that there is no merit to appellant's argument and no showing, either affirmatively or otherwise, of any abuse of discretion on the part of the trial court, upon which a violation of petitioner's rights under the XIVth Amendment of the Constitution of the United States, can be based.

POINT II

Petitioner's second question and argument as to the prejudicial conduct and remarks by the trial judge and the alleged publicity thereon, is not properly preserved for review before this tribunal.

It is a well established principle of this Court that before it will review a decision of a State Court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that said State Court's decision of the federal question was necessary to its determination of the cause, *Honeyman* v. *Hanan*, 300 U. S. 14, 18; *Lynch* v. *New York*, 293 U. S. 52.

Petitioner states that "The additional ground asserted herein that petitioner was deprived of a fair trial *in violation of the XIVth Amendment* by the prejudicial conduct and remarks of the Trial Court publicized in the local newspapers and on the radio *was raised in the Trial Court by a motion for a mistrial (R. 1600, 1610) and in Pt. III of the*

brief submitted to the Court of Appeals of the State of New York". (Emphasis supplied.) (Petitioner's brief, pp. 2, 3).

The reference to the record cited by petitioner to establish the jurisdictional grounds for this Court to review, reveal only that petitioner moved for a mistrial on the basis of an alleged claim of actual bias on the part of the Trial Judge (R. 1000), and that newspaper and radio publicity created an atmosphere which was not conducive to a fair trial (R. 1610) (Petitioner's brief, pp. 2, 3). Nowhere does petitioner state, either at the places he cites, or elsewhere in the record, that his motion for a mistrial is based on a violation of the XIVth Amendment of the Constitution of the United States or on any other federal ground nor is this motion based on a violation of the Constitution of the State of New York.

Point III of petitioner's brief to the Court of Appeals of the State of New York does not raise, much less mention, a violation of the XIVth Amendment of the Constitution of the United States (Appellant's brief, Court of Appeals, State of New York, pp. 32-37). It is significant to note that Point II of petitioner's brief to said Court specifically raises with reference to petitioner's first ground here, a federal question (violation of the XIVth Amendment of the Constitution of the United States).

Petitioner did not consider this second ground of sufficient weight and importance to urge a violation of his rights under either the State or Federal Constitutions.

The fact that present counsel for petitioner were recently substituted does not, in any way, change the situation.

Even if counsel were substituted in time, to move to amend the remittitur of the Court of Appeals, of the State of New York, that motion would have been denied as no federal question was ever raised on the trial, in the intermediate appellate court or before the Court of Appeals of the State of New York. Said federal question could

not have been passed upon by said Court of Appeals, and the remittitur could not have been amended to indicate that such a non-existent federal question was passed upon.

As this Court stated in *Cornell* v. *Green*, 163 U. S. 76, 77:

> "The Constitution of the United States is not mentioned in the bill of Cornell, or in the demurrer of the defendant, or in the decree or the opinion of the Court. The case appears to have been treated throughout as depending upon a question of chancery practice, not of constitutional right. The first indication of anything like an intention on the part of the plaintiff to invoke the protection of the Constitution of the United States is in the suggestion, in the assignment of errors, 'that said finding deprived said complainant of his property without due process of law.'"

The second ground urged by petitioner is not properly the subject of review before this Court.

CONCLUSION

The petition should be denied.

Dated: Riverhead, New York, August 18, 1960.

Respectfully submitted,

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